BRAUCHER'S BUSINESS: FORESEEING RELATIONAL CONTRACT BANKRUPTCY

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Jean Braucher was a leading scholar of contract and consumer bankruptcy law. Although she did not devote substantial energy to corporate bankruptcy, an important but comparatively under-cited 1994 paper, Bankruptcy Reorganization and Economic Development ("Economic Development") *recognized that "relationalism"—and, by inference, relational contract theory—could provide a powerful set of tools with which to analyze corporate reorganization under chapter 11 of the Bankruptcy Code. The rise of "distress investing," and distress investors' use of contract in bankruptcy, require us to better understand the relational aspects of the contracting environment in chapter 11. In* Economic Development, *Jean anticipated the relevance of this analysis long before most of us did.*

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INTRODUCTION

We typically think of Jean Braucher as a scholar of contracts and consumer-related law, and, in particular, consumer bankruptcy.[1] While this of

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1. A quick scan of her SSRN page, for example, reveals that of the 6,500+ downloads of her 25 posted papers, almost all involve consumer bankruptcy or consumer contracting. *See Jean Braucher's Scholarly Papers*, SOC. SCI. RESEARCH NETWORK,

course is true, I want to suggest that Jean also had important insights about business law, as reflected in a comparatively under-cited symposium paper she published in Capital University Law Review in 1994, *Bankruptcy Reorganization and Economic Development* ("*Economic Development*").[2] The traits we most admire in her contracts and consumer scholarship—her commitment to realistic appraisals of the operation of legal (and social) systems in action, with an underlying commitment to social justice—are just as evident in *Economic Development* as her better-known, consumer-oriented work. I also hope to show how *Economic Development* provides a launch point for another (and I hope better) way to understand the role that contract theory can play in corporate reorganization under chapter 11 of the Bankruptcy Code.[3]

This brief Article proceeds in three parts. Part I situates *Economic Development* in the "contract-bankruptcy" debate, one of the more important debates regarding corporate reorganization, then and now. The contract-bankruptcy debate asks whether, or to what extent, contract—as distinct from mandatory rules—should determine outcomes in reorganization. In its early days, "contractualists"

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http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=329668#reg (last visited Jan. 25, 2016). Major articles include: Jean Braucher, *Bankruptcy Reorganization and Economic Development*, 23 CAP. U. L. REV. 499 (1994) [hereinafter Braucher, *Economic Development*]; Jean Braucher, *Committee Educational Session: Financial Advisors Bankruptcy Practice and the Law of Unintended Consequences: Be Careful What You Wish For*, 033111 ABI-CLE 783 (2011); Jean Braucher, *Concurrent Session: Ethics: Creditor/Debtor Conflicts Outside of Bankruptcy*, 120702 ABI-CLE 99 (2002); Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990); Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices—a Question of Professional Responsibility*, 5 AM. BANKR. INST. L. REV. 165 (1997); Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295 (2006) [hereinafter Braucher, *Fresh Start*]; Jean Braucher, *Getting It for You Wholesale: Making Sense of Bankruptcy Valuation of Collateral After Rash*, 102 DICK. L. REV. 763 (1998); Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 AM. BANKR. INST. L. REV. 349 (2008); Jean Braucher, *Harmonizing the Business Bankruptcy Systems of Developed and Developing Nations: Some Issues*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 473 (1997); Jean Braucher, *Leases: Transactional Issues Under Article 2A Distinguishing a True Lease from a Secured Transaction*, CA08 ALI-ABA 317 (1995); Jean Braucher et al., *Race Disparity in Bankruptcy Chapter Choice and the Role of Debtors' Attorneys*, 20 AM. BANKR. INST. L. REV. 611 (2012); Jean Braucher, *The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law*, 75 WASH. U. L.Q. 549 (1997); Jean Braucher & Roger Henderson, *Uniform Computer Information Transactions Act (UCITA): Objections from the Consumer Perspective*, 6 CYBERSPACE L. 2 (2005).

2. Braucher, *Economic Development*, *supra* note 1. According to Westlaw, the paper has been cited 17 times.

3. Chapter 11 usually governs corporate reorganization, and generally refers to 11 U.S.C. §§ 1101–1174, as well as other provisions of the Bankruptcy Code and Judicial Code. The current version of the Bankruptcy Code was originally enacted in 1978. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). It has been amended several times, the most significant recent amendment being in 2005. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11, 18, 28 U.S.C.).

such as Jackson and Baird argued for greater private ordering,[4] while opponents (including Jean) were skeptical on both normative and methodological grounds. Part I observes that a critical omission from the debate was that its antagonists (or perhaps agonists) seemed to talk past one another. Those who argued that contract should play a greater role in reorganization had a unifying theory of contract based in the University of Chicago's brand of law and economics, which emphasized a certain free-market ideology. Their opponents (except, perhaps, Jean) did not—offering instead other legal, institutional, or methodological claims about the best ways to conceptualize and assess the reorganization process.[5]

Part II addresses this omission. It builds on one of the core insights in *Economic Development*: relationships—and, by hypothesis, a relational theory of contract—may be a useful counterpoint to the contractualist position. "Relational contract theory"[6] focuses on "the commitment that [parties] have made to

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4. The contractualist position is rooted in the work of Thomas Jackson. THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 32–33 (1986) [hereinafter JACKSON, LOGIC AND LIMITS] (developing "creditor's bargain" theory); *see also* Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97 (1984); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 860 (1982) [hereinafter Jackson, *Bankruptcy*]; Anthony T. Kronman & Thomas H. Jackson, *Secured Financings and Priorities Among Creditors*, 88 YALE L.J. 1143 (1979); Robert E. Scott, *Through Bankruptcy with the Creditors' Bargain Heuristic*, 53 U. CHI. L. REV. 690, 692 (1986) (reviewing DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY (1985) and describing Baird and Jackson's creditors' bargain heuristic as "set[ting] the terms of the scholarly debate for the next decade"). Alan Schwartz has perhaps developed the strongest version of this view. In his provocative 1998 paper, Schwartz argued that "[v]iewing bankruptcy through the lens of contract theory reveals bankruptcy's anachronistic character: Bankruptcy is a government enterprise. The state runs the postal system and the bankruptcy system, and restricts competition with both by law. This Essay's central claim is captured in a variation on a trendy slogan: Privatize bankruptcy." Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1850–51 (1998).

5. About 20 years ago, Professors Block-Lieb and Tung anticipated the possibility of the relational analysis I present here. *See* Susan Block-Lieb, *Why Creditors File So Few Involuntary Petitions and Why the Number Is Not Too Small*, 57 BROOK. L. REV. 803, 862 n.221 (1991) (discussing relationalism in involuntary bankruptcies); Frederick Tung, *Confirmation and Claims Trading*, 90 NW. U. L. REV. 1684, 1754 n.177 (1996) (citation omitted) ("Chapter 11 in essence replaces the debtor's multiple bilateral prebankruptcy obligations with a sort of multilateral relational contract."). Neither paper focused on relationalism in the reorganization process as it has evolved.

6. Major relationalist works include the following: OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING (1985); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) [hereinafter Macaulay, *Non-Contractual*]; Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877 (2000); Ian R. Macneil, *Contracts: Adjustments of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 895 (1978) [hereinafter Macneil, *Adjustments*]; Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 693 (1973) [hereinafter Macneil, *Many Futures*] (discussing 'the real life of contractual

one another, and the conventions that the trading community establishes for such commitments . . . ."[7] It thus rejects the view that contract is solely "the paradigm transaction of traditional contract law, [the] discrete transaction."[8] Rather, finding roots in Stewart Macaulay's path-breaking study of business-contracting practices,[9] relationalists recognize that "a unitary contract law appropriate to all [contracting] environments is a hopeless fiction."[10] Ever the good relationalist, Jean foresaw in *Economic Development* that the insights of relational contracting theory might enhance the efficacy and understanding of chapter 11 reorganization.

It is not possible to develop a holistic relational theory of contract in bankruptcy in a symposium paper.[11] Instead, Part III offers three reasons why such an approach may be useful to observers of, and participants in, the chapter 11 process. First, the relational dynamics of chapter 11 have changed significantly since it was enacted in 1978. Chapter 11 has long reflected what Robert Scott might call a "contracting environment."[12] For the first 25 years or so of practice under chapter 11, the expectation—though not always met—was that a corporate debtor would reorganize "in place." This meant that chapter 11 reorganization sought to preserve relationships endogenous to the firm, in particular among managers, pre-bankruptcy stakeholders—e.g., creditors and employees. Today, chapter 11 is still a relational

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behavior'); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 852 (2000) [hereinafter Scott, *Formalism*].

7. Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 569. Scott and Goetz provide the following:

> A contract is relational to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations. Such definitive obligations may be impractical because of inability to identify uncertain future conditions or because of inability to characterize complex adaptations adequately even when the contingencies themselves can be identified in advance. . . . [L]ong-term contracts are more likely than short-term agreements to fit this conceptualization, but temporal extension per se is not the defining characteristic.

Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091 (1981).

8. Victor P. Goldberg, *Relational Contract*, *in* NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 292 (Peter Newman ed., 1987); Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 741 (2000) ("Relational contract simultaneously dramatically broadens and dramatically fragments the scope of contract law as compared to neoclassical law.").

9. Macaulay, *Non-Contractual*, *supra* note 6.

10. Robert E. Scott, *The Promise and the Peril of Relational Contract Theory*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY 105, 108 (Braucher et al. eds., 2013) [hereinafter Scott, *Promise*].

11. Indeed, I offer a somewhat fuller, but still preliminary, view of this in a forthcoming paper that is far longer than this one. *See* Jonathan C. Lipson, *Bargaining Bankrupt: A Relational Theory of Contract Bankruptcy*, 6 HARV. BUS. L. REV. (forthcoming 2016) [hereinafter Lipson, *Bargaining Bankrupt*].

12. Scott, *Promise*, *supra* note 10. Marc Galanter has similarly described "bargaining arenas." *See* Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 272–73 (1984).

process, but the principal actors and their relationships are largely exogenous to the pre-bankruptcy firm. Reorganizations, especially of larger firms, tend to be dominated by a fairly small group of repeat players, such as distress investors,[13] claims traders, law firms, and turnaround experts. Large cases will tend to be filed in one of two courts (those in the Southern District of New York and Wilmington, Delaware) that are often distant from (that is, exogenous to) the debtor's operational sites. Chapter 11 may have always had relational aspirations, but it has gone from a process focused largely on relationships internal to the firm to one focused on relationships external to the firm. While this tends to describe large-company bankruptcies, even smaller cases, such as those considered in *Economic Development*, have important relational dimensions that are largely unexplored. To the extent that chapter 11 creates contracting environments, *Economic Development* foresaw that relational contract theory can help to explain it.

Next, Part III observes that relational-contracting literature is often concerned with the normative implications of promissory behavior on and off contract. To what extent, for example, will or should contract rules permit, promote, or deter significant power imbalances or externalized social costs? Many who study the transformation of chapter 11 worry that it increasingly tolerates opportunistic behavior that is normatively troubling but largely immune to censure given existing law and practice.[14] Of special concern is the use of contract and contract-like mechanisms, such as the "structured dismissal," to give distributional (priority) gains to powerful creditors at the expense of small-dollar or poorly coordinated creditors, such as terminated employees.[15] This appears to be an example of "priority-skipping," which observers such as Roe and Tung worry impairs the

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13. Distress investors include hedge funds and private equity funds that invest—e.g., lend to or purchase claims against—in financially distressed companies. *See, e.g.*, Michelle M. Harner, *The Corporate Governance and Public Policy Implications of Activist Distressed Debt Investing*, 77 FORDHAM L. REV. 703 (2008) (describing the activities of distressed debt investors); Marcel Kahan & Edward Rock, *Hedge Fund Activism in the Enforcement of Bondholder Rights*, 103 NW. U. L. REV. 281, 282 (2009) ("What distinguishes hedge funds from other investors is that hedge funds tend to pursue active and aggressive investment strategies. Thus, hedge funds use leverage, sell short, and invest in derivatives. They trade much more frequently than other investors."); Jonathan C. Lipson & Christopher diVirgilio, *Controlling the Market for Information in Reorganization*, 18 AM. BANKR. INST. L.J. 647 (2010); Jonathan C. Lipson, *Governance in the Breach: Controlling Creditor Opportunism,* 84 S. CAL. L. REV. 1035 (2011) [hereinafter Lipson, *Governance in the Breach*] (discussing creditor pre-bankruptcy effort to obtain control of corporate debtors); Jonathan C. Lipson, *The Shadow Bankruptcy System*, 89 B.U. L. REV. 1609, 1640 (2009) [hereinafter Lipson, *Shadow Bankruptcy*] (discussing the problem of creditor control in bankruptcy committees).

14. *See, e.g.*, Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862 (2014); Lipson, *Shadow Bankruptcy*, *supra* note 13, at 1647–48; Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1 (2007) [hereinafter LoPucki & Doherty, *Fire Sales*].

15. *See, e.g.*, *In re* Jevic Holding Corp., 787 F.3d 173 (3d Cir. 2015) (upholding structured dismissal that altered statutory priorities and discharged debts over creditors' objections).

efficiency of chapter 11.[16] Moreover, these mechanisms may accelerate the loss of going concerns and jobs, defeating one of Congress' key remedial and relational goals for chapter 11.[17] To the extent that chapter 11's contracting environment permits or promotes destructive opportunism, relational-contracting theory helps to frame, articulate, and perhaps begin to address the problem.[18]

Finally, there is growing pressure to amend the Bankruptcy Code,[19] which will soon be 40 years old.[20] One might think that Congress (or even the U.S. Supreme Court) are the logical institutional choices to improve bankruptcy law and practice. Unfortunately, Congress' most recent major amendments to the Bankruptcy Code are widely viewed as flawed, infected by both bias and technical errors.[21] Although the Court is the final interpreter of the Bankruptcy Code, it has

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16. Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV. 1235, 1237–40 (2013) (discussing "priority jumping" efforts by distress investors).

17. The legislative history explains:

> The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. . . . It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets.

H.R. REP. NO. 95-595, at 220 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179; *see also* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.").

18. *See* Gordon, *supra* note 7, at 570–71 (characterizing this as the "potential dark side of continuing contract relations, as organic solidarity is the bright side: what starts out as a mere inequity in market power can be deepened into persistent domination on one side and dependence on the other"); *see also* Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 469 ("Continuing relationships are not necessarily nice. The value of arrangements locks some people into dependent positions.").

19. *See generally* AM. BANKR. INST., CHAPTER 11 COMMISSION 2012–2014 FINAL REPORT 1–18 (2014), https://abiworld.app.box.com/s/vvircv5xv83aavl4dp4h; *Rethinking Chapter 11*, NAT'L BANKR. CONFERENCE (2015), http://drive.google.com/a/temple.edu/file/d/0BzGxkXL_Y_oATkYtaUM1MnhrNXM/view.

20. Superstition among practitioners holds that Congress only materially alters bankruptcy law at 40-year intervals because the two prior bankruptcy laws—the Bankruptcy Act of 1898 and the Chandler Act of 1938—were each in force for about 40 years (1898–1938 and 1938–1978, respectively). Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *amended by* Chandler Act, ch. 575, 52 Stat. 840 (1938), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (2000 & Supp. V 2005)). Before that, the United States only sporadically had a federal bankruptcy law in force. Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 625–30 (2008) [hereinafter Lipson, *Debt and Democracy*] (discussing the origins of bankruptcy law in America). The current Bankruptcy Code will turn 40 in 2018.

21. *See, e.g.*, Braucher, *Fresh Start*, *supra* note 1, at 1296 (footnotes omitted) (citations omitted) ("'The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005' commits two counts of intentional fraud in its name alone. The law . . . does not do a

proved in recent years that it is hardly infallible.[22] In this light, contract becomes an increasingly important mechanism of institutional reform in bankruptcy. Thus, the important question is not *whether* we should permit contracting in bankruptcy, but by what standards we should assess—and thus permit or forbid—those contracts?

Economic Development was (and remains) important because it foresaw and articulated the focus that we must place on the relationships that actually drive reorganization—those involving promissory behavior on and off contract. Failing to understand these relationships—and their contractual dynamics and contours—leaves us under-equipped to assess and improve the chapter 11 process.

I. BRAUCHER'S BUSINESS—*ECONOMIC DEVELOPMENT* AND THE CONTRACT-BANKRUPTCY DEBATES

In *Economic Development*, Jean made two positive claims: (1) it was too early to declare chapter 11 a failure in 1994, as some argued, given the novelty of the system and the lack of data about its performance; and (2) if, as some thought, reorganization under chapter 11 was problematic, the insights of economic development initiatives might improve outcomes in chapter 11 for both debtors and creditors.

Written in part as a response to a symposium paper by Donald Korobkin,[23] *Economic Development* was concerned with the plight of small businesses, and the reality that the "failure" rate of small businesses in chapter 11 appeared to be quite high,[24] if liquidation following an attempted reorganization was considered a failure. Concerns about the frequency of liquidation (rather than reorganization) had, in turn, led to controversial calls to modify or abandon chapter 11.[25]

Braucher, Korobkin, and other contributors to the 1994 symposium[26] were participating in an important academic debate about the proper role of contract in

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good job of preventing abuse and also does not protect consumers but rather puts new burdens on all filers, even the worst-off who are clearly not abusers.").

22. *See infra* note 90 and accompanying text (discussing the *Stern* case).

23. Donald R. Korobkin, *Vulnerability, Survival and the Problem of Small Business Bankruptcy*, 23 CAP. U. L. REV. 413 (1994). Jean also argued that Korobkin's "Rawlsian" theory of bankruptcy was unlikely to be helpful because, among other reasons, Rawls himself disclaimed any role for his theories of positive moral philosophy in matters so prosaic as contract, much less bankruptcy. For his part, Korobkin responded that Jean undervalued the role of normative theory in discussions about bankruptcy theory and policy. *See* Donald R. Korobkin, *Reply to Braucher and Ponoroff*, 23 CAP. U. L. REV. 521, 522 (1994) (Braucher "misconstrues the role of normative theory . . . . The primary role of normative theory is not to explain the outcomes we find embodied in current law, but to provide a principled basis on which to evaluate those outcomes.").

24. According to Jean, about 75% of small businesses ultimately file chapter 11. *See* Braucher, *Economic Development*, *supra* note 1, at 500.

25. *See, e.g.*, Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1078–79 (1992) ("Chapter 11 should be repealed, abolishing court-supervised corporate reorganizations and, in effect, precluding residual claimants from participating in any reorganization of the firm.").

26. I note that Dean Ponoroff, an organizer of this Symposium, contributed to the symposium in which *Economic Development* appeared. Lawrence Ponoroff, *Enlarging the*

chapter 11 reorganization. Initially, this was viewed as a debate about the procedural versus substantive goals of reorganization.[27] Should bankruptcy merely be a collective process whereby state-law-created entitlements—e.g., under contract and property law—are sorted out in accordance with the vested rights of the claimants?[28] Or should it reflect substantive policy choices, recognizing redistributional preferences expressed by Congress in the Bankruptcy Code? In that case, redistribution may be an inevitable, and perhaps virtuous, feature of bankruptcy. Contractualists took the former position. They generally viewed bankruptcy as procedural law, which should be understood largely as a response to a collective-action failure. The state-law entitlements created under doctrines of contract, property, and so on should be enforced to the maximum extent possible to effectuate the "creditor's bargain" (the "agreement one would expect . . . creditors to form among themselves were they able to negotiate such an agreement from an *ex ante* position").[29]

The theory has had traction among academics. Professors Adler,[30] Listokin,[31] Rasmussen,[32] and Schwartz,[33] among others, have all offered creative variations on this basic theme. This may be because the core challenge contractualists pose—under what conditions is private ordering superior to "public," mandatory ordering—has special, if problematic, salience to a process such as bankruptcy, which, as I have observed elsewhere, is a hybrid of public and private elements.[34] It is a difficult question, the answer to which is nevertheless important to developing a plausible understanding of the system.

Bargaining Table: Some Implications of the Corporate Stockholder Model for Federal Bankruptcy Proceedings, 23 CAP. U. L. REV. 441 (1994).

27. The launch point is typically sourced to Jackson. *See supra* note 4 and accompanying text.

28. *See supra* note 4 and accompanying text.

29. Jackson, *Bankruptcy*, *supra* note 4, at 860.

30. *See* Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311, 323, 332–33 (1993). Under this proposal, a firm would include a "chameleon equity" scheme in the corporate charter at the time of formation or upon mutual agreement with a debtor when receiving financing. Essentially, if a firm with equity, unsecured debt, and secured debt that used chameleon equity became insolvent, the equity interest (junior claimants) would be extinguished and the unsecured debt (or next in priority) would become the residual claimants against the firm's assets. Participating creditors would automatically be replaced with holders of chameleon equity claims.

31. *See* Yair Listokin, *Paying for Performance in Bankruptcy: Why CEOs Should Be Compensated with Debt*, 155 U. PA. L. REV. 777, 783 (2007) (proposing to pay executives with debt of chapter 11 debtors).

32. *See* Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51, 53–54 (1992) ("Congress should create a menu bankruptcy system. Under this system, a firm upon formation would be required to select one of the alternatives from the menu, thereby specifying the firm's available bankruptcy option. Such a commitment mechanism would assure all potential lenders that their rights would be governed by the same bankruptcy regime as the rights of all the firm's other creditors.").

33. *See* Schwartz, *supra* note 4, at 1811.

34. *See* Lipson, *Debt and Democracy*, *supra* note 20, at 678 ("[B]ankruptcy presents a highly complex mix of public and private rights."); Jonathan C. Lipson & Jennifer L. Vandermeuse, *Stern, Seriously: The Article I Judicial Power, Fraudulent Transfers, and*

An array of scholars, including Jean and Korobkin, lined up in opposition to the contractualist approach. These "anticontractualists," or "traditionalists," opposed contract-bankruptcy on a variety of grounds. Jean contended that more empirical work was needed before arguing for greater freedom of contract in reorganization.[35] Others, such as Korobkin and Susan Block-Lieb, claimed that contract-bankruptcy conflicted with normative principles embedded in bankruptcy policy.[36] Still others, such as Senator Warren, believed that contractualism was simply one policy choice that Congress could have made—but did not make—in enacting the Bankruptcy Code. Bankruptcy policy, in her reckoning, necessarily embraced complex, "competing—and sometimes conflicting—values."[37] Too much time spent theorizing about what chapter 11 should do merely distracted from the more important task of understanding what it actually did do.

It appears that, while opponents of contract-bankruptcy offered a menu of grievances with the theory, they did not focus on the core of the contractualist claim: a theory of contract. This is unfortunate because one could say that contractualism was problematic not only because it may have diverted attention from the system's operation, but also because it relied on what Robert Ellickson might call a "cardboard" Coasean model of contract.[38] Named for economist Ronald Coase, this hypothetical model started from the assumption that contracting involves bilateral

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Leveraged Buyouts, 2013 WIS. L. REV. 1161, 1167 ("[T]he reality of the bankruptcy process . . . seems best understood as a hybrid of public and private rights.").

35. *See* Braucher, *Economic Development*, *supra* note 1, at 500 ("The empirical work still needs to be undertaken.").

36. *See* Susan Block-Lieb, *The Logic and Limits of Contract Bankruptcy*, 2001 U. ILL. L. REV. 503, 520–25; Donald R. Korobkin, *The Role of Normative Theory in Bankruptcy Debates*, 82 IOWA L. REV. 75, 104 (1996).

37. Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 777 (1987) (suggesting various distributional goals besides economic efficiency).

38. Robert C. Ellickson, *The Case for Coase and Against "Coaseanism*,*"* 99 YALE L.J. 611, 612 (1989). An acute example of the omission appears in Schwartz, whose title, *A Contract Theory*, promises just that: theory. Schwartz, *supra* note 4. Yet, as LoPucki points out in his reply to Schwartz's second attempt at stating a "contract theory" of bankruptcy, Schwartz's basic premises ("implicit assumptions") about contract theory were, in fact, unsupported by contract theory. Lynn M. LoPucki, *Bankruptcy Contracting Revised: A Reply to Alan Schwartz's New Model*, 109 YALE L.J. 365, 366–67 (1999). Schwartz argued that "[c]ontract-theory models assume that parties will not engage in fraud." Alan Schwartz, *Bankruptcy Contracting Reviewed*, 109 YALE L.J. 343, 349 (1999). This was wrong. As LoPucki explains:

> Schwartz cites two articles in which the authors expressly assumed that the contracting parties would be truthful, but it is equally easy to cite articles in which the authors expressly assumed the contracting parties in their models could lie. More to the point, the authors Schwartz cites do not make the no-lying assumption merely because it is a convention of contract theory; they make it because it is plausible given the other assumptions of their model. By contrast, Schwartz's original model assumes that the private information (the private benefits) is "unverifiable," making an assumption of truthful disclosure implausible.

LoPucki, *supra*, at 367.

monopoly (two parties), and low (or zero) transaction and information costs.[39] To be sure, the diplomacy of law and economics has required contractualists to relax these assumptions to varying degrees.[40] Nevertheless, they have been the starting point of analysis, even though they are conditions that one never finds in bankruptcy—a collective proceeding that can involve hundreds, if not thousands, of stakeholders.[41]

Anticontractualists were more concerned with challenging the assumptions of the Coasean contract than with considering alternative theories of contract. So, for example, Lynn LoPucki has argued that "[t]he case for freedom of contract rests squarely on the assumption that each party chooses the contract because the contract makes that party better off."[42] The problem, he argued, was that contractualists failed to recognize significant disparities in bargaining capabilities across a corporate debtor's body of claimants. Thus, small or unsophisticated creditors would suffer the redistributive problem that contract bankruptcy was meant to solve. Whether or not this was true as an empirical matter, there was no competing theory of contract on which to base such claims.

II. EMPIRICS, RELATIONSHIPS, AND *ECONOMIC DEVELOPMENT*

Although Jean did not explicitly offer a contract-based alternative to contract-bankruptcy theory, her relationalist tendencies are evident in *Economic Development.* Jean recognized that to understand chapter 11, one had to study it in operation—including the relationships that it created, preserved, and destroyed. Thus, she argued that more empirical scholarship on business bankruptcy was required.[43] Jean challenged contractualists to develop data that would support their claims about reorganization, in particular that it was an inefficient exercise that

39. Coasean contracting seeks to minimize transaction costs incurred by parties bargaining around these default terms in favor of explicit terms. *See* Jason Scott Johnston, *Opting in and Opting out: Bargaining for Fiduciary Duties in Cooperative Ventures*, 70 WASH. U. L.Q. 291, 293–94 (1992); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615, 624 (1990); *see generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

40. As Barry Adler explains, if we did reside in a world of bilateral monopoly, low information costs, and easy access to information, then "corporate bankruptcy law itself would be largely unnecessary." Barry E. Adler, *Bankruptcy Primitives*, 12 AM. BANKR. INST. L. REV. 219, 230 (2004) [hereinafter Adler, *Bankruptcy Primitives*] (recognizing that bankruptcy creates "a conflict-ridden, uncertain environment"). Yet, the Coasean bargain retains a deep allure for contractualists. *See, e.g.*, Barry E. Adler, *Game-Theoretic Bankruptcy Valuation*, 41 J. LEGAL STUD. 209, 215–16 (2012) (arguing that Coasean bargains may occur but "they can be expensive and are not inevitable").

41. *See, e.g.*, Merton H. Miller, *Leverage*, 46 J. FIN. 479, 484 (1991) (observing that bankruptcy costs are high and can entirely consume assets of smaller firms); *see also* Adler, *Bankruptcy Primitives*, *supra* note 40, at 231. Key legal reasons the conditions do not exist in bankruptcy include the fact that commencement of a case creates an "estate" composed of all property of the debtor, 11 U.S.C. § 541(a) (2012), and will likely result in a discharge of all claims against the debtor. 11 U.S.C. § 1141(d).

42. Lynn LoPucki, *Contract Bankruptcy: A Reply to Alan Schwartz*, 109 YALE L.J. 317, 341–42 (1999).

43. *See* Braucher, *Economic Development*, *supra* note 1, at 500 ("The empirical work still needs to be undertaken.").

redistributed wealth from creditors to managers or other "non-contractual" stakeholders, like employees.[44] "The arm-chair empiricism of the law and economics school," she noted, "driven by free-market ideology, is bound to be error-ridden."[45] Contractualists have since embraced empirical methods.[46] At that time, however, Jean was concerned that "[t]he dirty little secret about law and economics is not that it is usually a normative enterprise, but that it is typically *only* normative, assuming rather than testing the nature of the law's effects."[47]

Although underwhelmed by law and economics, Jean was not insensible to the potential benefits of market forces. Rather, *Economic Development* shows that she had a keen appreciation for the economic incentives likely at work in the reorganization process and how those incentives would challenge defenders of the reorganization process as it then existed. "One can characterize the position of undersecured and unsecured creditors as being forced to make interest-free loans of their liquidation shares to the reorganization effort," she noted, "with some hope of getting larger shares if the effort succeeds."[48] This was potentially problematic, she argued, because it appeared that most businesses failed to reorganize. This would be costly to creditors. The automatic stay would deprive them of the right to pursue immediate collection, and all but the debtor's over-secured creditors would lose the right to receive interest on their claims during the case. With the passage of time spent in reorganization, asset values would decline and the time value of money would be lost to most creditors.[49]

She recognized that the empirical challenge would be formidable because so little information was readily available about distressed companies, and especially information that would make possible meaningful comparisons:

> We lack much information about the businesses that file under chapter 11 such as the debtors' financial situations at filing, the precipitating factors in decisions to file, and whether in general chapter 11 cases deplete or enhance the value of the bankruptcy estate. Those who argue for reform of bankruptcy reorganization law often start by observing that many debtors are using chapter 11 as a stalling tactic. This observation is based on the fact that most chapter 11 debtors do not successfully reorganize. Therefore, some critics say we should eliminate chapter 11 and let creditors decide whether to sell the assets piecemeal or as a going concern. These critics seem to believe debtors who file in chapter

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44. *See id.* at 505 ("Because the case has yet to be made that creditors as a group are losing more than they gain from chapter 11, the lack of attention to market failure is the crucial defect in the law and economics school's thinking as applied to bankruptcy reorganization. We should re-examine our current bankruptcy reorganization system for inefficiency, but we cannot do this without large investments in empirical research.").

45. *Id.*

46. *See, e.g.*, Douglas G. Baird & Edward R. Morrison, *Serial Entrepreneurs and Small Business Bankruptcies*, 105 COLUM. L. REV. 2310 (2005).

47. Braucher, *Economic Development*, *supra* note 1, at 511.

48. *Id.* at 510.

49. *Id.* ("Essentially, the argument is that the increased risks to creditors in chapter 11 have turned out to be so large that the losses exceed the gains.").

> 11 and dawdle there a long time would—without that option—promptly liquidate under chapter 7 or nonbankruptcy law.
>
> This is the wrong comparison. How are debtors to be lured into bankruptcy if they face immediate liquidation there? And do businesses distribute less to creditors when they employ chapter 11 before their demise? If owners and managers are not enticed into bankruptcy by a chance to reorganize, many will instead survive as long as possible outside bankruptcy-forestalling creditors piecemeal, using up assets, and then ending up with nothing left to distribute to creditors. Although most debtors who file in chapter 11 end up liquidating, some are liquidated sooner and with less loss of asset value than if chapter 11 had not been used. Even if liquidation eventually occurs, chapter 11 sometimes enhances the value of the estate-for example, by reducing the pressure to sell estate property immediately and thus allowing more leisurely sale, with better returns.[50]

Thus, Jean foresaw the two persistent challenges for those who seek to study chapter 11 empirically. First, even with electronic case records and readily available statistical packages, it can be difficult to obtain and manage information about chapter 11 debtors for many reasons.[51] In part, this is because control of the reorganization process appears to have shifted significantly to distress professionals (specifically investors and their advisors), who are largely immune from many of the information-forcing obligations the Bankruptcy Code imposes on chapter 11 debtors.[52] The incentives and actions of hedge funds and private equity funds that purchase and trade significant tranches of defaulted corporate debt, for example, are often opaque.[53]

Second, one can always dispute the normative premises being tested. Thus, Jean's observations presaged what came to be understood as the "success" debates.[54]

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50. *Id.* at 514–15.

51. It is, of course, true that in the 20+ years since *Economic Development,* there has been an explosion in empirical legal studies of bankruptcy.

52. And even those obligations imposed on debtors are not taken seriously. *See, e.g.*, Jonathan C. Lipson & Christopher J. Marotta, *Examining Success*, 90 AM. BANKR. L.J. (forthcoming 2016) (reporting empirical study of low incidence of bankruptcy examiner appointments).

53. *See generally* Lipson, *Shadow Bankruptcy*, *supra* note 13, at 1653–64. Recent amendments to bankruptcy rules of procedure may help by forcing distress investors to reveal their "disclosable economic interests." FED. R. BANKR. P. 2019(a)(1). A "'disclosable economic interest' means any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right or derivative right granting the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest." *Id.* The disclosures "shall be filed by every group or committee that consists of or represents, and every entity that represents, multiple creditors or equity security holders that are (A) acting in concert to advance their common interests, and (B) not composed entirely of affiliates or insiders of one another." *Id.* 2019(b)(1).

54. *Compare* Bradley & Rosenzweig, *supra* note 25, at 1078–79 ("Chapter 11 should be repealed, abolishing court-supervised corporate reorganizations and, in effect, precluding residual claimants from participating in any reorganization of the firm.") *with*

How should one define success in reorganization? Is it measured as a function of distributions to creditors? If so, what is the baseline comparison? If the measure is something other than creditor distributions, such as debtor survival as a going concern,[55] then the questions focus on the characteristics of the survivor, such as the number and treatment of employees, post-bankruptcy financial performance, and so on. Do we, in short, measure success from the perspective of the recoveries of financial stakeholders (in particular institutional creditors) or do we dilate the lens, taking in other stakeholders affected by the reorganization effort? Jean recognized that how one frames the question inevitably affects the answer.

While scholars gather data about the operation of the system (as in fact occurred in the intervening years), what else should the reorganization system do in the meantime? Jean's second argument in *Economic Development* was for a pragmatic and innovative proposal to help address the apparent problem of failure within chapter 11. The techniques of economic development, she argued, could help troubled companies use chapter 11 more frequently and more successfully (defined along almost any dimension).

Drawing from the work of Albert O. Hirschman, Jean argued that economic development was an institutional project that could promote outcomes that were both fair and efficient.[56] The insights of economic development literature were, in her view, salient in chapter 11 for two reasons. First, economic development contemplated services and support that financially distressed businesses would often need, but would not likely get, because the debtors themselves lacked funds to purchase such support. Creditors would be reluctant to risk reducing their recoveries to permit such expenditures. Although she did not elaborate on the sorts of services she had in mind, she noted that they might include information, counseling, and credit contacts.[57] "Even if the costs of these programs exceeded the gains in successful reorganizations," she observed, such programs might be "better bait" for debtors considering the use of chapter 11. This "better bait might be cost-effective as a means to achieve greater returns to creditors through earlier or less pressured liquidations."[58]

Lynn M. LoPucki & Joseph Doherty, *Bankruptcy Survival*, 67 UCLA L. REV. 970 (2015), Lynn M. LoPucki, *Changes in Chapter 11 Success Levels Since 1980*, 87 TEMP. L. REV. 989 (2015), *and* Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 355 (1993) ("[T]he [Bankruptcy] Code carries out a deliberate distributional policy in favor of all those whom a business failure would have hurt. The choice to make bankruptcy 'rehabilitative' represents a desire to protect these parties along with the debtor and creditors who are more directly affected."); *see also* Lipson & Marotta, *supra* note 52; Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 612–40 (2009) (describing value-creating aspects of chapter 11).

55. *See* LoPucki & Doherty, *Fire Sales*, *supra* note 14, at 30–31.

56. Braucher, *Economic Development*, *supra* note 1, at 507; *see also* ALBERT O. HIRSCHMAN, RIVAL VIEWS OF MARKET, SOCIETY AND OTHER RECENT ESSAYS 105–39 (1986); ALBERT O. HIRSCHMAN, THE STRATEGY OF ECONOMIC DEVELOPMENT (1958); Jean Braucher, *Toward a Broader Perspective on the Role of Economics in Legal Policy Analysis: A Retrospective and an Agenda from Albert O. Hirschman*, 13 LAW & SOC. INQ. 741 (1988).

57. *See* Braucher, *Economic Development*, *supra* note 1, at 517.

58. *Id.*

Second, reorganization under chapter 11 can itself be seen as performing a kind of economic development function. The goal of economic development, she explained, is to facilitate the process of forming capital and the organizations that would deploy that capital.[59] So, too, with chapter 11:

> Bankruptcy reorganization can be viewed as partly serving a preservation function for aggregations of capital. This preservation includes human capital invested in developing expertise in managing and working for a particular business. Chapter 11 is a means to stop the dismantling of businesses and provides an opportunity to look for ways to keep them intact. Particularly in view of our lack of success in devising effective programs to help start businesses, it makes sense to save existing ones when possible, unless the costs exceed the gains. It has been observed that development exponentially breeds more development so that preserving businesses has important benefits by providing a ripple effect.[60]

As a pragmatist, Jean recognized that a proposal of this sort would raise a number of questions. It would, for example, be important to think about who paid for the economic development services she had in mind. While she argued that creditors might consider it to be in their self-interest because companies so advised would, on average, be worth more to them than companies that were not, it would be difficult to know for sure. Moreover, whether reorganization itself could have an impact on economic development more generally would be difficult to study empirically given the number of variables potentially involved.[61] Thus, in Jean's characteristically direct fashion, she argued that, pending the availability of more and better data, "the principle of law that ought to govern" should not be the contractualist theories of reformers, but instead "inertia."[62]

It requires no citation to know that Jean was a strong supporter of the relational contracting framework. That is, after all, the predicate underlying *Contracts: Law in Action*, the casebook she edited along with Professors Macaulay, Kidwell, and Whitford.[63] While relational contracting literature has produced different, sometimes conflicting views,[64] it seems safe to say that relationalists of various stripes recognize that the institution of contract—its doctrine, theory, policy,

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59. *Id.* at 518 ("The perspective that bankruptcy reorganization serves an economic development function might also be helpful. It is costly to aggregate capital and develop a business organization. The task of economic development policy is to facilitate that process.").

60. *Id*. (footnotes omitted).

61. *See id.* at 519 ("The question whether bankruptcy reorganization helps or hinders economic development may be difficult or impossible to test because there are so many variables, but that only means that the empirical case has not been made for gains in economic growth from dramatic changes in our business bankruptcy law.").

62. *Id*.

63. In the interest of full disclosure, Jean asked me to join that casebook as a co-editor, and I agreed.

64. *See* Scott, *Promise*, *supra* note 10, at 106–07.

and practices—should be understood to vary as a function of context.[65] The context that matters greatly (if not the most) will usually be the relationships of the parties.

To the extent that relationalists seek to use contract as a mechanism to preserve relationships where possible, *Economic Development* hints at chapter 11's relational potential. If the goal is to preserve "human capital invested in developing expertise in managing and working for a particular business" and to avoid "dismantling . . . businesses and provide[] an opportunity to look for ways to keep them intact,"[66] then Congress' original vision for chapter 11 had a particular relationalist theme. Preserving relationships within the firm would be an important goal in and of itself, potentially maximizing value for both financial and nonfinancial stakeholders.[67]

Yet, Jean did not wear rose-tinted glasses. She recognized that no "debtor's bargain" proposed by Congress would long withstand market and other institutional pressures from creditors. Thus, her operating hypothesis about reorganization and the relationships it preserves necessarily subordinates the interests of less powerful stakeholders. "My hypothesis is that current business bankruptcy law does little or nothing to protect jobs or other reliance interests when doing so is not in creditors' collective interests," she noted.[68] That is, even if there is a debtor's bargain reflected in the Bankruptcy Code, it remained subject to important checks protecting creditors.

The heart of the paper's proposal—economic development services—thus reflects a strong relationalist tendency. Focusing on small- and medium-sized businesses, she recognized that these are the types of firms most likely to need—yet least likely to get—the resources and technical support required to survive, and perhaps thrive. Large companies that fail are more likely to have hired cadres of consultants to advise the company before and during its distress. They do not need economic development help because they are, in a basic sense, already economically developed, even if they are troubled. Yet, the underlying point for both large and

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65. We typically denote the dawn of relationalism with citation to Stewart Macaulay, *Non-Contractual*, *supra* note 6. A good intellectual history of relationalism, with an assessment of different relationalist subgroups, appears in Scott, *Promise*, *supra* note 10.

66. *See* Braucher, *Economic Development*, *supra* note 1, at 518. She elaborated:

> As conventionally understood, the purposes of bankruptcy reorganization law are to save viable businesses and, as a result, to benefit all those who have a stake in them-including creditors, stockholders, and employees. The traditional view is that by saving any given business as a going concern, bankruptcy reorganization law preserves wealth-particularly, the surplus value of the business as a going concern over its piecemeal liquidation value. The surplus allows more repayment to creditors and simultaneously preserves the interests of stockholders and those who rely on the debtor, but have no contractual claims against it. The latter group includes: suppliers, customers, employees, taxing authorities and many other parties who may be indirectly affected by the demise of the debtor.

Id. at 509 (footnotes omitted).

67. *Id.*

68. *Id.* at 512–13.

small debtors would be the same: If we want to improve outcomes in reorganization, we must think about the promissory relationships that comprise the debtor, and how the chapter 11 process affects those relationships.

III. SO WHAT?

Having established that Jean had prescient relationalist insights into the reorganization process, an important question remains: Who cares? What value, if any, does a relationalist framework add to our understanding of the chapter 11 system? Would it provide a better path to the reform contractualists sought 20 years ago, demands for which persist today? Would it instead vindicate the anticontractualists? Consider three answers.

First, relationalism provides a way to understand the transformation of the chapter 11 process in the years since Jean wrote. As noted at the outset, chapter 11 has long emphasized relationship maintenance.[69] But the relationships that seem to matter have changed significantly. As explained above, *Economic Development* explicitly focused on chapter 11's role in preserving relationships within the firm—in particular among employees and financial stakeholders—suggesting that a relational-contracting framework would provide insight into the process. Today, however, the relationships that matter are chiefly outside the firm—among distress investors and the professionals who likely influence the case.[70] These relationships matter because they appear to produce outcomes quite different from what Congress expected when it enacted chapter 11, in particular more, and more rapid, liquidations rather than reorganizations "in place."[71] The important questions—beyond the scope of this paper—are whether the transformation is problematic and, if so, what to do about it.

For now, it is sufficient to note that relationalism would encourage us to focus on the characteristics of this contracting environment. In large chapter 11 cases, there is a contracting community that is exogenous to the debtor. It is chiefly located in or around one of two courts (the Southern District of New York or Wilmington, Delaware), not necessarily where the debtor has its principal place of business.[72] Its members tend to appear in many of the same cases. Distress investors—key participants—may not have been a corporate debtor's original lenders, but there is a good chance they will have purchased defaulted claims against the debtor in the secondary market.[73] The debtor's management may well have been replaced prior to bankruptcy, at the behest of distress investors, who want the debtor

69. *See supra* text accompanying note 13.

70. The boundary between "inside" and "outside" the firm is arguably ambiguous, although the idea captures a widely acknowledged intuition about changes in the characteristics of participants in chapter 11. Defining that boundary presents interesting questions beyond the scope of this paper.

71. *See* Jacoby & Janger, *supra* note 14; LoPucki & Doherty, *Fire Sales*, *supra* note 14.

72. *See, e.g.*, Laura Napoli Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. 381, 386–87 (2015) ("[F]orum shopping has divorced modern bankruptcy practice from traditional historical principles underlying the bankruptcy system and venue itself.").

73. *See* Lipson, *Shadow Bankruptcy*, *supra* note 13.

to be managed through bankruptcy by a "turnaround professional."[74] A small number of law firms provide these services. Weil, Gotshal & Manges; Kirkland & Ellis; and Jones Day for example, tend to be repeat players.[75]

While it is difficult to know what goes on inside this community,[76] it appears that its members are repeat players in a contained environment. The relational characteristics of this community—its preferences for formal or informal mechanisms, promises of future play or retribution, etc.—will determine the kinds of contracts that it produces. The relationalist project is deeply invested in studying these kinds of environments, although it is only beginning to take seriously Jean's suggestion that we focus on chapter 11's relational aspects.

This contracting environment is materially different from the contracting environment that existed in the early days of practice under chapter 11, including when Jean observed it. Then, as she noted, reorganization existed in significant—but not exclusive—part to preserve relationships within the firm in the sense that it sought to maintain the debtor as an ongoing concern and "restructure" its balance sheet. A chapter 11 plan may well have adjusted some relationships, for example, by eliminating the rights of junior claimants (shareholders) under the "absolute priority rule."[77] But, the relationships of those involved with the corporate debtor—its managers, employees, and creditors—were likely to remain fairly stable during the process.[78] As a seasoned practitioner once explained to me, under prior practice, "The . . . premise was that the parties would sit at the table and negotiate and know what one another wanted. Today, you have no idea what someone's real incentives are."[79]

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74. Turnaround managers, such as "chief restructuring officers," are discussed in Kevin M. Baum, *The Basics for Retaining a CRO*, 30 AM. BANKR. INST. J. 50, 50 (2011) (quoting Shai Y. Waisman & John W. Lucas, *The Role and Retention of the Chief Restructuring Officer, in* AM. RESTRUCTURING & INSOLVENCY GUIDE, 2008/2009, at 200 (2008)). For a good discussion of concerns these professionals can raise, see A. Mechele Dickerson, *Privatizing Ethics in Corporate Reorganizations*, 93 MINN. L. REV. 875 (2009).

75. Full disclosure: I was an associate in the bankruptcy group at Kirkland & Ellis from 1992 to early 1995. I note also that there is good reason to think that even in the early years of chapter 11, these and similar law firms were important repeat players. They may have had implicit promissory relationships that affected their behavior from case to case. Some worried that in that period, lawyers ran the process more for their benefit than that of the debtor and its stakeholders. The *Eastern Airlines* case is considered the poster child for otherwise viable debtors killed by greedy lawyers. *See $86 Million Bill for Eastern*, N.Y. TIMES, Aug. 2, 1991, at D5 (noting that bills for lawyers and other professionals reached $86 million in the failed Eastern Airlines reorganization).

76. Douglas G. Baird & Thomas H. Jackson, *Bargaining After the Fall and the Contours of the Absolute Priority Rule*, 55 U. CHI. L. REV. 738, 741 (1988) ("Although . . . negotiations are the lifeblood of . . . bankruptcy practice, the rules that should govern these negotiations are largely unexplored in the academic literature.").

77. 11 U.S.C. § 1129(b)(2)(B) (2012).

78. Of course, managers were fired and employees laid off, even under the "old" chapter 11. But who made those decisions, and the nature of their relationships, appear to have changed.

79. *See* Lipson, *Shadow Bankruptcy*, *supra* note 13, at 1654.

The contracting that seems to be of greatest importance today will involve priority. That is, sophisticated stakeholders (distress investors) will bargain amongst themselves, and with the debtor's (turnaround) management, to obtain priority during bankruptcy that they may not enjoy absent bankruptcy. This may occur through the so-called "roll-up" of debt in a debtor-in-possession financing facility, where a secured creditor agrees to extend new credit during a case in exchange for fully collateralizing a pre-petition deficiency.[80] It may also occur through "structured dismissals," where a secured creditor and a creditor's committee representing unsecured creditors may agree to dismiss a case in exchange for an order from the court distributing the debtor's remaining assets (likely the cash proceeds from an asset sale). These distributions may, however, deviate from the priority rules embedded in, for example, §§ 507 and 726 of the Bankruptcy Code.[81] Instead, priority will be determined according to the agreement among the select parties who control the case and the dismissal process.

Second, relationalism appears concerned with the real effects of norms, incentives, and sanctions (formal and informal) in a contracting environment. As Robert Gordon has explained:

> In the messy and open-ended world of continuing contract relations, where the contours of obligations are constantly shifting, the effects of power imbalances are not limited to the concessions that parties can extort in the original bargain. Such imbalances tended to generate hierarchies that can gradually extend to govern every aspect of the relation in performance. This is the potential dark side of continuing contract relations, as organic solidarity is the bright side: what starts out as a mere inequity in market power can be deepened into persistent domination on one side and dependence on the other.[82]

This speaks directly to problems created by contracting in bankruptcy that may harm estate stakeholders. Will the powerful parties in chapter 11 cases—presumptively distress investors but perhaps unions or the U.S. government, as some allege happened in the automaker cases[83]—exploit leverage that judges cannot detect or constrain? Relational contracting literature has not always had perfect

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80. *See* Lipson, *Bargaining Bankrupt*, *supra* note 11 (discussing roll-up in Colt bankruptcy).

81. 11 U.S.C. §§ 507, 726. *See* Lipson, *Bargaining Bankrupt*, *supra* note 11 (discussing the *Jevic* case); *see also In re* Jevic Holding Corp., 787 F.3d 173 (3d Cir. 2015) (upholding structured dismissal that altered statutory priorities and discharged debts over creditors' objections). Another popular example involves so-called "gift plans," in which a senior secured creditor shares some of its recovery under a plan with a junior stakeholder, usually in order to induce the junior stakeholder to support the plan. *Compare In re* SPM Mfg. Corp., 984 F.2d 1305, 1313 (1st Cir. 1993) (approving "gift" plan), *with In re* DBSD N. Am., Inc., 634 F.3d 79 (2d Cir. 2011) (declining to approve such a plan).

82. Gordon, *supra* note 7, at 570.

83. Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy*, 108 MICH. L. REV. 727 (2010).

answers to these questions. But, it is deeply concerned with exposing and framing the questions in the hope that the legal process will, over time, develop answers.

At this point, one may object and say that Jean's *Economic Development* was really about small business bankruptcies, and I am speaking of the contracting environment in large cases. It is well known that the dynamics of large and small cases are quite different.[84] So why would we think that the relational contours of large cases bear any resemblance to those of small cases? In fact, it would appear based on preliminary research that relationships do matter in small cases, just in ways that may differ from the relationships in large cases. Baird and Morrison, for example, observe that "[f]or small businesses, the relevant unit of analysis is the owner and operator of the business, not the business itself."[85] If this is true, then the important questions about small chapter 11 businesses will involve the entrepreneur's relationships and not, as conventionally thought, the formal characteristics of the corporate debtor's capital structure.[86]

Third, and independent of the question of debtor size, is the role of contract in bankruptcy reform. There are growing calls to amend chapter 11 of the Bankruptcy Code.[87] In some cases, proposed amendments would address apparently opportunistic behavior by powerful creditors.[88] While it is possible that Congress could amend the Bankruptcy Code to "level the playing field," that seems unlikely. Similarly, one could imagine that the Supreme Court, as the ultimate judicial authority overseeing bankruptcy courts, could produce change in response to concerns about contracting in bankruptcy.

The problem is that neither Congress nor the Court has shown great understanding or appreciation of the chapter 11 system, or bankruptcy in general. Rather, it is more likely that any effort to amend the Bankruptcy Code today would be as fraught with cronyism as were the 2005 amendments to the Bankruptcy Code, which were decried by Jean and virtually all other observers for their ineptitude and bias.[89] Similarly, controversial opinions about the scope of bankruptcy court power like that in *Stern v. Marshall* invite some to wonder whether the Chief Justice and a majority of the Court understand what bankruptcy is (or should be) about.[90]

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84. *See* Lipson & Marotta, *supra* note 52.

85. Baird & Morrison, *supra* note 46, at 2311. Their study looks at the chapter 11 docket of the Bankruptcy Court for the North District of Illinois for a single year. It is difficult to know how much one can generalize from observations of cases in a single year in a single district.

86. In the end, Baird and Morrison worry that chapter 11's efforts to promote the maintenance of existing relationships may, perversely, do more harm than good due to what they call "the principal and altogether neglected cost of chapter 11: It discourages small entrepreneurs from exiting existing businesses and finding new, sometimes better matches with their human capital—either a new business or an employment opportunity." *Id.* at 2318.

87. *See supra* note 18.

88. *Id.*

89. *See* Braucher, *Fresh Start*, *supra* note 1, at 1296; Lipson, *Debt and Democracy*, *supra* note 20, at 624–37.

90. *See* Lipson & Vandermeuse, *supra* note 34. In *Stern v. Marshall*, a divided Supreme Court held that bankruptcy courts, as congressional courts created under Article I of the Constitution, may not "finally adjudicate" "private" causes of action involving state law

If we can trust neither Congress nor the Court to make appropriate changes to chapter 11, that leaves contract as a potentially superior institutional alternative. A comparative institutional analysis of this hypothesis—that contracting is a better reform mechanism than congressional or judicial intervention—is beyond the scope of this Article. Yet, if contracting in bankruptcy is the trend it appears to be, then getting it right may be the best we can do given the available "imperfect alternatives."[91]

CONCLUSION

Jean might have been content with reforming bankruptcy through contract. Not only was she an outspoken critic of the 2005 amendments to the Bankruptcy Code (referring to them as "BARF"[92]), but she also had an enduring faith in the contracting process if it reflected a commitment to social justice. Relational contracting literature is admittedly a sprawling body of work. Not all of it would share Jean's vision of "just" contracting in a chapter 11 environment. Yet, it would appear that, as with many things, Jean Braucher was ahead of us in seeing that relationships and relationalism matter to business bankruptcy in unexpected and important ways. Although she left us too soon, she gave us a legacy of scholarship that enables us to see farther than would have been possible without her contributions. She, and her capacity to perceive and create relationships that others could not, will be sorely missed.

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claims. 131 S. Ct. 2594, 2609 (2011) (explaining that only Article III courts may adjudicate "traditional actions at common law tried by the courts at Westminster in 1789") (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring)). Because most adversarial practice in bankruptcy involves just such causes of action, the courts were flooded with litigation over the scope of *Stern*'s holding. Since then, the Court has retreated somewhat from its holding in *Stern*, providing that parties may "consent" to adjudications by Article I bankruptcy courts. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

91. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

92. *See* Braucher, *Fresh Start*, *supra* note 1, at 1296 (noting that soon after enactment, "bankruptcy experts began to refer to [the 2005 amendments] by the fanciful acronym BARF (perhaps for 'BAnkruptcy ReForm Act' or 'Bankruptcy Abuse Reduction Fiasco'), a sure sign of the enterprise's distress").